CF302

(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

S.A. NO. 152/2004 Single Bench

APPELLANT PLAINTIFF : Jagsai S/o Dhadhu, aged about 67 years, R/o. vill. Hanumangarh, Tah. Surajpur, Distt. Surguja (C.G.).

VERSUS

RESPONDENTS DEFENDANTS :

1. Nanduram S/o. Mansai, aged about 57 years.
2. Naval Sai S/o. Dhiran, aged about 57 years.
3. Sonsai S/o Dhadhu, aged about 72 years.

All are R/o. Hanumangarh, Tah. Surajpur, Distt. Surguja (C.G.).

4. State of Chhattisgarh Through- Collector, Surguja District Surguja (C.G.).

P. R. No. 74/104
Presented by Shri Ram Niwas Bhaskar
dated 15.03.04

SECOND APPEAL UNDER SECTION 100 OF CIVIL PROCEDRRE CODE.

AFR

(29)

HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

SECOND APPEAL NO. 152 OF 2004

Jagsai

Vs.
Nanduram & others

JUDGEMENT

Post for /3 .12.2004

Sd/-
Sunil Kumar Sinha
Judge

(30)

HIGH COURT OF JUDICATURE AT BILASPUR (C.G)

SECOND APPEAL NO. 152 OF 2004

Jagsai

Vs.

Nanduram & others

Shri J.K. Shastri, counsel for the appellant.

Shri Neeraj Mehata and Shri Sanjeev Kumar Agrawal, Panel Lawyers for the State.

JUDGEMENT

(13 -12-2004)

SUNIL KUMAR SINHA, J

Heard on the question of admission.

This appeal has been filed by the plaintiff under section 100 of the Code of Civil Procedure against the judgment and decree dated 31.01.2004 passed in Civil Appeal No.7-A of 2003 by the First Additional District Judge, Surajpur, District Surguja (C.G) arising out of Judgment & Decree dated 16.12.2002 passed in Civil Suit No.182-A/1996 by the Civil Judge, Class-II, Surajpur, Distt. Surguja. The trial Court dismissed the suit of the plaintiff, thereafter the appellate Court had also dismissed his appeal. In this way, the plaintiff lost in both the Courts' below.

(2) The plaint allegations are that the suit lands, two in number, were self acquired property of the father of plaintiff and defendant

no.3 namely Dhadu. After death of Dhadu, his entire property was succeeded by these two brothers. There was a partition between them 15 years prior to the date of institution of the suit and in the said partition, these suit lands were allotted in the share of the plaintiff alone. Defendants no.1 and 2 are having no right, title or interest over these suit lands. The plaintiff further pleaded that he was peacefully cultivating the suit lands. However, in the month of November 1996, defendants no.1 & 2 tried to interfere with his possession which gave rise to a cause of action in his favour to file the instant suit. The suit was filed for declaration of title and also for permanent injunction.

(3) Defendants no.1 & 2 filed their written statement denying the allegations of the plaintiff. It was pleaded by them that in fact, the father of the plaintiff and defendant no.3 namely late Dhadu had sold these properties to defendant no.1 executing a registered sale deed dated 19.4.1985 (Ex.D-1) in his favour for a consideration of Rs.1000/-. He also handed over the possession of the suit properties to defendant no.1 and from the date of sale defendant no.1 is in peaceful possession of the suit lands.

(4) The learned trial Court framed various issues and after recording evidence of the parties, dismissed the suit of the plaintiff holding that in fact, the father of the plaintiff and defendant no.3 had lawfully alienated this property by executing a sale deed dated 19.4.1985 (Ex.D-1) in favour of defendant no.1. It was also held

that the suit lands are in possession of defendant no.1 and the plaintiff was having no right or title over the suit property.

(5) Against the aforesaid judgment and decree passed by the trial Court, the plaintiff filed an appeal before the lower appellate Court but the lower appellate Court also dismissed the appeal of the plaintiff affirming the judgment and decree passed by the trial Court. In this manner the appellant/plaintiff having lost in both the Courts below has filed this Second Appeal under section 100 of the Code of Civil Procedure.

(6) Learned counsel for the appellant submits that the two Courts below committed an error of law in holding that a valid sale deed dated 19.4.1985 (Ex.D-1) was executed in favour of defendant no.1 and the findings in this regard are perverse. He further submits that in fact, defendant no.1 could not prove the valid execution of the sale deed and in absence of the same, the suit was required to be decreed. In fact, during the course of arguments he tried to make out a case of fraud being played by defendant no.1 against his father and also a case of nonpayment of consideration by the said defendant to him.

(7) I have gone through the records of the two Courts and have also perused the judgment and decree passed by them. Neither in the trial Court nor in the First Appellate Court, the plaintiff raised the plea of fraud. Even a single word in relation to fraud being

played by defendant no.1 against his father has not been pleaded. The only pleading taken by the plaintiff by way of amendment before the trial Court after filing of the written statement by the defendants reads as under:

> "इस वाद भूमि को कभी भी वादी के पिता स्व. ढाढू राम द्वारा प्रति. कं. 1 को विक्रय नही किया गया है । यदि प्रति. कं. 1 के पास कोई विक्रय पत्र है तो वह जाली एवं फर्जी है, उक्त विक्रय पत्र के आधार पर प्रति. कं. 1 को कोई स्वत्व एवं अधिकार प्राप्त नही होता है ।"

In the said situation, this Court is not inclined to consider such a plea for the first time at the second appellate stage. More over, the plea of fraud and also the plea of non-passing of consideration are the pleas available to the parties to the document. A third party cannot maintain the suit on these grounds by raising them even for the first time in second appeal. These grounds require clear and definite pleadings disclosing time, place and the manner in which the fraud was played alongwith its particulars and positive allegations in this regard. I am fortified in my views by a Judgment of the M.P. High Court pronounced by His Lordship Justice T.C. Shrivastava, Judge (as he then was) in the matter of Sunderlal –Vs- Anup Kunwarbai reported in 1960 MPLJ Short Note 154 which clearly indicates that an attack on sale deed on account of fraud and want of consideration the grounds are available to the party to the sale deed alone and the stranger to transaction cannot attack the deal on these grounds. Therefore, I am not inclined to

entertain such a ground in this appeal. Now coming to the second point regarding proof of execution of sale deed, I am of the opinion that the execution has been validly proved. Defendant no.1 has examined himself and has also examined one of the attesting witnesses namely Boloram as D.W.2 who have clearly stated that the father of the plaintiff had executed the sale deed dated 19.4.1985 (Ex.D.1) and the property was sold to defendant no.1. The trial Court has dealt with this issue vide para 10 of the judgment. The first appellate Court has also dealt with the issue and has recorded a positive finding that it could not be established that the sale deed dated 19.4.1985 (Ex.D.1) is a fraudulent document. Recording the aforesaid findings concurrently, the two courts below have dismissed the suit of the plaintiff and in the second appellate stage, an interference by this Court under the provisions of Section 100 of the Code of Civil Procedure is not possible.

(8) The Hon'ble Apex Court in the matter of Roop Singh (dead) through L.Rs. –Vs- Ram Singh (dead) through L.Rs., reported in (2000) 3 SCC Pg.708 has laid down that "it has to be reiterated that under section 100 C.P.C., the jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve the substantial question of law and it does not confer any jurisdiction on the High Court to interfere with the pure questions

of fact while exercising its jurisdiction u/s 100 C.P.C." (See para 7 of the Judgment).

(9) Again the Apex Court laid down in the matter of Thiagarajan and others –Vs- Sri Venugopalaswami B.Koil and others reported in (2004) 5 SCC Pg.762 that "the existence of a substantial question of law is the sine qua non for the exercise of jurisdiction under the amended provisions of section 100 C.P.C." (see para 20 of the judgment). All these pronouncements go to show that unless a substantial question of law is involved in a case, no second appeal would be entertainable by the High Court exercising jurisdiction under section 100 C.P.C. Since no question of law is involved in the present case, this Court is not inclined to interfere in the findings recorded by the two Courts below. Hence, this second appeal deserves to be dismissed and accordingly it is dismissed at the admission stage without any orders as to the costs.

Sd/-
Sunil Kumar Sinha
Judge

Rao